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February 7, 2022

Ms. Stacey Jensen  
Office of the Assistant Secretary of the Army for Civil Works  
Department of the Army  
108 Army Pentagon  
Washington, D.C. 20310-0104

Ms. Damaris Christensen  
Office of Water  
Oceans, Wetlands and Communities Division  
U.S. Environmental Protection Agency (EPA)  
Room 3505  
1200 Pennsylvania Avenue N.W.  
Washington, D.C. 20460

RE: Docket ID No. EPA-HQ-OW-2021-0602

Dear Ms. Christensen and Ms. Jensen:

The Texas Department of Transportation (TxDOT) appreciates the opportunity to provide comments on the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers' (USACE) Public Notice associated with Docket ID No. EPA-HQ-OW-2021-0602 regarding a revised definition of "Waters of the United States."

TxDOT concurs with the comment letter prepared and submitted by the American Association of State Highway and Transportation Officials (AASHTO) in response to the Public Notice referenced above. On behalf of TxDOT, I would like to add the following comments.

TxDOT supports and recommends continued implementation of the Navigable Waters Protection Rule (NWPR), which excluded, by rule, ephemeral features and most ditches from jurisdiction. Due to implementation of the NWPR, TxDOT has needed to use fewer non-reporting Nationwide Permits, submit fewer Pre-Construction Notifications, and seek fewer Standard Permits, saving taxpayer dollars and agency staff hours. It has also helped ensure that projects remain on time and within budget, consistent with the Fixing America's Surface Transportation (FAST) Act and the Infrastructure Investment and Jobs Act (IIJA).

TxDOT maintains concern that the proposed rule, as written, fails to exclude ephemeral features and most ditches from jurisdiction, as accomplished by the NWPR. Subsequently, TxDOT anticipates a substantial increase in taxpayer dollars and agency staff hours to achieve the level of productivity required to adhere to the FAST Act and IIJA while ensuring the safe and efficient movement of people and goods across Texas. Reverting to the components of the pre-2015 regulatory guidance, captured in the proposed rule as written, evokes continuing uncertainty related to the jurisdiction of ephemeral features and ditches, and leaves the status of these features up to interpretation by USACE districts. Considering Texas' four USACE districts, in past scenarios, each district has interpreted the jurisdiction of an ephemeral feature or ditch in a distinct way. TxDOT respectfully

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requests that the final rule provide explicit clarity and reasonable support for when ephemeral streams and ditches are and are not waters of the United States. Specifically, TxDOT requests that a ditch be excluded by rule unless it:

- 1) reroutes an intermittent or perennial tributary; or
- 2) runs through an adjacent wetland, defined as wetland that:
  - a) matches the definition found in the final rule, and
  - b) existed prior to ditch development and not as a result of ditch development.

TxDOT understands that important exceptions to this exclusion may exist and further requests explicit notation in the final rule to any exception to the exclusion.

We look forward to continued collaboration with the EPA and the USACE to ensure TxDOT fulfills its mission while avoiding, minimizing, and mitigating impacts to the aquatic environment in a successful, ecologically meaningful, and fiscally responsible way.

TxDOT appreciates the opportunity to comment and hopes it provides value to the EPA and the USACE as you develop a final rule. You may also be receiving comments on this proposed rule from other Texas State agencies. If you have any questions, please call me at (512) 305-9515 or you or your staff may contact Melanie Alvord, Director, Federal Affairs Section at [Melanie.Alvord@txdot.gov](mailto:Melanie.Alvord@txdot.gov) or at (512) 944-5135.

Sincerely,



Marc D. Williams, P.E.  
Executive Director

Cc: William L. Hale, P.E., Chief Engineer, TxDOT  
Brian R. Barth, P.E., Deputy Executive Director for Program Delivery, TxDOT  
Doug Booher, Division Director, TxDOT  
Melanie Alvord, Federal Affairs Section Director, TXDOT